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No. 910-913

ABRAHAM L. SHUSHAN,

versus

UNITED STATES OF AMERICA

Petition of Abraham L. Shushan for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and Brief in Support Thereof.

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HAUSER PRINTING CO., INC., NEW ORLEANS

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Abraham L. Shushan, a citizen of the United States, domiciled in the State of Louisiana, respectfully brings this, his application for a writ of certiorari, to review the final judgment of the United States Circuit Court of Appeals for the Fifth Circuit in this criminal case.

OPINION BELOW

Petitioner was convicted on December 22nd, 1939, in the District Court of the United States for the Eastern District of Louisiana of violating the Mail Fraud Statute (section 215, Criminal Code; 18 U.S.C.A., 338).

He was found guilty on eight mailing counts (out of nine charged in the indictment). The verdict was similar as to all five defendants, including petitioner. Likewise was the sentence (imposed January 2nd, 1940), the same as to all defendants, petitioner being condemned to serve, on the various counts, concurrent sentences of imprisonment in the penitentiary of thirty (30) months and to pay a fine of $2,000.00. Petitioner thereupon took his appeal to the United States Circuit Court of Appeals for the Fifth Circuit, where judgment was rendered affirming the conviction of all five defendants, including petitioner, on January 18th, 1941 (see opinion, Tr. Vol. VIII, page 4801; 117 Fed. (2d) 110). Petitioner, within the delays allowed by law, and on February 8th, 1941, filed his petition for a rehearing in the said United States Circuit Court of Appeals for the Fifth Circuit (see Tr. Vol. VIII, page 4855), which petition for rehearing was denied on March 3rd, 1941 (Tr. Vol. VIII, page 4860). That on March 7th, 1941, a stay of mandate was ordered by the United States Circuit Court of Appeals for the Fifth Circuit for a period of thirty (30) days, exclusive of Sundays and holidays, from March 3rd, 1941, to enable petitioner to apply to this Honorable Court for a writ of certiorari to review said final judgment of the United States Circuit Court of Appeals for the Fifth Circuit (Tr. Vol. VIII, page 4862).

STATUTE INVOLVED

The statute under which defendant was convicted (section 215, Criminal Code; Title 18, U.S.C.A. 338) reads in its pertinent provisions, as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises,

> * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the Post Office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet or advertisement, shall be fined not more than $1,000, or imprisonment not more than five years, or both." (R. S. Sec. 5480; Mar. 2, 1889, c. 393, Sec. 1, 25 Stat. 873; Mar. 4, 1909, c. 321, Sec. 215, 35 Stat. 1130).

JURISDICTION

Jurisdiction of this Honorable Court is invoked under paragraph (a) of Section 240 of the Judicial Code as amended (section 347, Title 28, U.S.C.A.), making it competent for this Court to review by certiorari any case, civil or criminal, in a circuit court of appeals; and the application is made within 30 days after entry of judgment (denial of rehearing), as required by Rule XI of this Honorable Court, promulgated May 7, 1934, and in the manner required by Rule 38 of this Honorable Court.

SUMMARY STATEMENT OF MATTER INVOLVED

On July 10th, 1936, the investment banking house at New Orleans of Newman, Harris & Company, com-

posed of the defendant Newman and the defendant Harris, made a contract with the Board of Commissioners of the Orleans Levee District, an agency of the State of Louisiana. The contract was that Newman, Harris & Company should reorganize the bonded indebtedness of the board, by such refunding sales as were found advisable, so as to level off and reduce the total bonded obligation of the board, if possible, for which services Newman, Harris & Company were to receive a wholly contingent fee of twenty-five (25) per cent of the savings effected, and were to assume all expenses of the undertaking and additionally post a forfeit of one per cent of the principal amount of all bonds called for redemption against any failure of the sale of the refunding bonds. In order to avoid the element of a preference to themselves over other bidders by reason of their own employment and contingent compensation, and thus invalidate the bidding, Newman, Harris & Company put a clause in their contract preventing their banking house from bidding on any issues of refunding bonds of the Orleans Levee Board offered for sale under this arrangement. This idea of a service in such an advisory capacity, on a contingent fee basis, with the necessary legal detail of exclusion from bidding, had originated with the defendant Miller, a prominent New Orleans accountant, who had previously sought defendant Shushan's financial backing, and Shushan had decided such service should preferably be performed by an experienced banking-house, such as Newman, Harris & Company. The latter expressed a willingness to go forward with the plan if Shushan would back his judgment by underwriting half any possible loss in the venture, for a consideration of one-half of any possible gain. Shushan agreed, and assigned one-third of his possible profits, or one-sixth of the whole, to defendant Miller for his idea, Miller to

stand no responsibility for any possible loss. Under this arrangement, in which Shushan and Miller remained as silent partners, Newman, Harris & Company carried out certain refunding operations in 1936 and 1937. At the time these operations were undertaken, it was impossible to foresee what the results might be, or what savings, if any, might be effected. The fair percentage of contingent fee was estimated, as far as it was possible to make such an estimate under the circumstances, at twenty-five per cent. By skillful handling of the plan, and unexpectedly favorable market conditions in municipal bonds during the period of operations, Newman, Harris & Company reduced the bonded obligation of the board within 15 months by approximately $2,000,000.00. On this savings thus effected, Newman, Harris & Company collected their contingent fee of twenty-five (25) per cent, and after deducting costs and expenses of approximately $100,000.00, the net fee was divided one-half to Newman, Harris & Company, one-third to Shushan, and one-sixth to Miller. Services under the contract terminated about October, 1937, when final payment on the Newman-Harris fee was made. The levee commissioners were well satisfied with the results, and the board's president testified at the trial in 1939 that he still thought the levee district had been greatly benefitted by the Newman-Harris plan. There was no criticism of the refunding operations from their close in October, 1937, until August, 1939, when a political campaign for the governorship was going on in Louisiana. Through a federal grand jury hearing in that month, Shushan learned for the first time that defendants Miller and Waguespack had filed, in March, 1938, federal income tax returns showing defendant Miller had given part of his proceeds of the contract to defendant Waguespack, who was Miller's own lawyer, but also a member of the levee board

at the time. The government also criticized two other things: first, that Newman, Harris & Company, long after the contract was made, but during its performance, had paid money to a minor employee of the board named Fitere for services which Newman and Harris thought were to the mutual advantage of the board and themselves in helping assure successful refundings of the board's bonds; and, secondly, that Newman, Harris & Company, in the custom of the municipal bond trade, had computed their contingent percentage fee against the present total of savings effected, whereas the government contended allowance should have been made, by some discount method, for savings of interest in future years, or, in other words, by applying a "future worth" theory which defendants showed was never practiced in the municipal bond trade. Chiefly on these three items of: (1) defendant Miller's division of profits with defendant board member Waguespack; (2) Newman, Harris & Company's employment of levee board clerk Fitere; and (3) the calculation of the savings effected to the board by the straight arithmetical method, rather than on the "future worth" theory, the five defendants were indicted and prosecuted because of certain mailings in connection with the refunding operations. The procuring of the indictment and the preparing of the case for trial, particularly against Shushan, who was politically prominent, was to the continuous accompaniment for four months of a barrage of antagonistic newspaper propaganda. This was in connection with an approaching bitter State election. Mr. Rogge, an assistant attorney-general sent to Louisiana contemporaneously with the political campaign, openly allied himself with the politicians opposed to the faction with which Shushan had previously been prominently identified. The New Orleans newspapers were also opposed to that faction

and Rogge joined with them in attacking Shushan, furnishing these newspapers with information, even out of the federal grand jury room. Rogge and these newspapers joined efforts in seeking, for weeks before trial, to discredit Shushan in the public mind, which would make it impossible for him to obtain a fair trial. Rogge purposely set the indictment down for trial in the month of December, 1939, in the feverish closing days of the political strife which was to culminate with the election of January 16th, 1939. Excluding the Christmas holidays, the trial ended two weeks before election day, the purpose being to bring about Shushan's conviction as a symbol of the corrupt character of the political faction the newspapers were opposing, and thus influence the result of the election in the final days of the campaign. Shushan and his co-defendants tried to get relief from this intolerable situation by two methods: as early as a month before trial they petitioned the district judge to restrain the daily prejudicial attacks of the local press by contempt action, and they made early and timely application that the trial be postponed beyond the date of the election. Neither relief was given, and the case went to trial under such horrible conditions that over 100 citizens made affidavits that the defendants could not expect to get a fair trial. A few blocks from the courthouse a political headquarters had displayed to public view for weeks a huge caricature of Shushan in a convict suit with words issuing from his mouth: "I tried to bribe the jury". A so-called convict parade had been given night after night at mass meetings, including the figure of a man in convict stripes labelled "Shushan". In the opening days of the trial the newspapers assailed Shushan so unfairly (merely a continuation of what they had done for four months before the trial) that the district judge had the publishers and reporters of two news-

papers cited for contempt and tried, convicted and punished them, although refusing defendants' applications for a mistrial on account of said publicity. Shushan contends that under these conditions of the prosecuting officer's conduct and the trial judge's failure to either grant protection or postpone the trial until after the election, he was not given due process of law, and his conviction was a foregone conclusion, despite the fact that neither the indictment nor the evidence presented a mail fraud case under the law.

QUESTIONS PRESENTED

The case, from the viewpoint of petitioner Shushan, presents two primary questions, either of which should warrant the issuance of a writ to review the proceedings below:

1. Neither under the terms of the indictment, nor the showing made by the evidence, was there any defrauding or obtaining of money or property by any scheme devised or intended to be devised by defendant Shushan, directly or through any other person. The demurrer to the indictment should have been sustained. In the alternative, the motion for a directed verdict of not guilty should have been sustained. As to the method of computing the fee for services rendered by Newman, Harris & Company, which was the only claimed element of fraudulent **obtaining** in the case, the Circuit Court of Appeals below said: "Yet we should hesitate to rest a criminal conviction of fraud on it alone." Then that court proceeded, by affirming the conviction, to do that very thing, since as a legal claim of fraudulent obtaining of money or property there was and is no other legal grounds of criminal action in the whole case.

2. Irrespective of the question of the sufficiency or

insufficiency of the indictment to make out a mail fraud case, or, in the alternative, the sufficiency or insufficiency of the evidence to support a mail fraud case, it is the contention of petitioner Shushan that by reason of the improper conduct of the Assistant Attorney-general in charge of the prosecution in co-operating with the newspapers to create prejudice against Shushan for political purposes, and then trying Shushan's case on the eve of a bitterly contested election and as a part of the campaign propaganda, this petitioner was not given due process of law in his trial.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The reasons relied on for the allowance of a writ of certiorari are:

1. That the constitutional and statutory rights of the petitioner Shushan have been infringed by conviction for using, or causing to be used, the mails, in furtherance of a scheme to defraud and for obtaining money or property by false pretenses, representations, or promises, where the petitioner Shushan, neither directly or through any other person, did not devise or intend to devise any scheme to defraud or for obtaining any money or property by false pretenses, representations or promises; but, on the contrary, the petitioner Shushan had engaged in a legal and proper undertaking, through honest, reputable and responsible people in the trade, which resulted to the advantage and benefit of the levee district, and had not been intended as, or caused a fraud upon, said levee district.

2. That the element in the case, unknown at the time to petitioner Shushan (as shown by all the evidence), of defendant Miller dividing part of his fee with defendant board member Waguespack, which in its worst

aspect could be only a violation of the State bribery law, has been shrewdly used by the prosecution to manufacture a color of fraud as to the performance of the contract itself; that since the contract was admittedly performed, and the fee paid was entirely contingent upon gain to the levee district, the prosecution has pitched its claim of fraudulent obtaining upon a contended wrong manner of computation of fee, whereas said claim of the prosecution is fanciful, arbitrary, and inconsistent with the contract itself and the custom of the municipal bond trade, and was merely used (in conjunction with the possible violation of the State bribery law) to create a false inference of a fraudulent obtaining of money.

3. That the constitutional and statutory rights of the petitioner Shushan have been further infringed by a conviction under the conditions and circumstances described in the annexed brief, where he was denied due process of law by the special prosecutor and the trial judge, and his trial was held under conditions approaching the famous propaganda trials of Soviet Russia.

TRANSCRIPT ANNEXED

The record having been printed for the use of the court below (Rule 38, paragraph 7), and the necessary copies so printed being furnished, your petitioner has filed herewith the copies of said record as printed below, together with the proceedings and opinion in the Honorable Circuit Court of Appeals for the Fifth Circuit, and due certificate thereon of the Clerk of said Court.

SUPPORTING BRIEF

Petitioner also files herewith and makes part of this application his brief in support thereof.

PRAYER

WHEREFORE, petitioner A. L. Shushan respectfully prays that a writ of certiorari may issue to the Honorable the United States Circuit Court of Appeals for the Fifth Circuit, to the end that this cause may be reviewed and determined by this Court; and that the judgment of the said United States Circuit Court of Appeals for the Fifth Circuit may be in due course reversed and set aside, and that judgment may be rendered in favor of petitioner, setting aside his conviction and sentence pronounced below, and discharging him forthwith; and petitioner prays for all further and necessary orders proper in the premises, and for all such relief as the nature of the case may justify.

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